IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1546

WILLIAM H. STAFFORD, JR.,
STUART J. CARROUTH and
CLAUDE MEADOW,

Petitioners,

v.

JOHN BRIGGS, ET AL.,

Respondents.

On Writ of Certiorari to The United States Court of Appeals for The District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONERS

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Respondents insist that this Court should interpret 28 U.S.C. §1391(e) to "ease the burden" of their action against petitioners. Respondents are reluctant to try this action in Florida, where all the wrongful acts they allege took place and where the majority of respondents reside. None reside in the picked forum in the District of Columbia. App. 8. They read the statute to give them a virtually unlimited choice of forum because of their status as constitutional tort plaintiffs.

Respondents' desire for radical change in the law of jurisdiction and venue does not bear on the construction of what is in fact a narrow, technical statute, limited to actions in

essence against the United States. Whether civil rights plaintiffs—suing in essence against individual persons—should be allowed to shuttle federal employees about the United States is a question for Congress.

Respondents' 132-page argument consists of inconclusive bits and pieces from the background and foreground of the statute. Respondents for the most part ignore the House and Senate Committee Reports, recognized by this Court as the preferred source of legislative intent

We submit respondents have not addressed the Committee Reports in context or with candor because respondents' essential position would explode.

The purpose and history of the Mandamus and Venue Act of 1962 as reflected in the Committee Reports make it clear that only actions in essence against the United States are included within its ambit. Those who bring actions in essence against federal officials for damages are treated the same as all other private litigants, who must follow normal and traditional procedures for obtaining jurisdiction and venue.

Respondents persist in reading Section 1391(e), Section 2 of the statute, in isolation—as if its companion section, 28 U.S.C. §1361, had nothing whatever to do with it and was concerned with an entirely different problem. Section 1391(e) is a necessary part of the two-part Mandamus and Venue Act —an act which covers precisely what its name states and no more.

The fatal flaw in respondents' argument is their premise that in 1962 Congress consciously legislated with *Bivens*-type damage actions in mind. This is inconsistent not only with the legislative history and purpose, but with the fact that such actions were not established until almost a decade later. Respondents employ this inventive but incorrect premise to create a distorted analysis of the legislative history. They vainly sift the legislative history for one express statement that Congress actually intended coverage of *Bivens*-type damage actions. Failing that, they look for a statement excluding *Bivens*-type damage actions. Failing that also, respondents claim that Section 1391(e) therefore creates jurisdiction over petitioners in this case. To the contrary, in order for respondents to prevail, they must show a clear expression of Congressional intent that this type of personal damage action was intended to be embraced by the Mandamus and Venue Act. This they cannot do.

Petitioners Stafford, Carrouth and Meadow were local federal officials stationed in the Northern District of Florida. All the acts complained of occurred there. Notwithstanding respondents' belated attempt here to connect petitioners with the District of Columbia, Resp. Br. 27-28, 125-126, Congress never intended to make these local officials subject to jurisdiction and venue throughout the nation. *Powers* v. *Mitchell*, 463 F.2d 212, 213 (9th Cir. 1972).

I.

THE DECISION BELOW IS INCONSISTENT WITH THE LANGUAGE OF SECTION 1391(e)

By taking a purportedly literal approach to the statute, respondents seek to demonstrate that the decision below was somehow compelled by the "plain meaning" of Section 1391(e).[1]

The language of the statute is wholly consistent with its limitation to actions in the *nature* of mandamus. The venue portion of the statute compliments the grant of mandamus jurisdiction and is addressed to one who "is acting" in his official capacity or under color of legal authority. If, as

[1] The fact that Section 1391(e) appears in Title 28 as a subdivision under a heading "Venue generally" should be of little comfort to respondents. This heading obviously refers to the topic of the entire section and not the subdivisions which are concerned with specific aspects of venue. The codification of the statute as a venue provision further confirms that it does not alone confer personal jurisdiction.

respondents erroneously contend, Congress meant to deal with damage actions asserting constitutional violations, this was an eccentric means of achieving that simple purpose. Petitioners submit that the statute means what it says—it controls venue and service in actions which concern present, ongoing official conduct.

Respondents say that this case "fits exactly within the statute." They reason:

> "at the time of the acts complained of, each [petitioner] was acting in his official capacity but beyond the scope of his authority, thus fitting within 'acting in his official capacity or under color of legal authority'". Resp. Br. at 31.

But Section 1391(e) embraces a "civil action in which a defendant is an officer acting" and not an action which alleges that at the time the acts complained of an officer *was* acting. When the statute is considered as a whole, it is clear that respondents read too much into it.

Respondents repeatedly refer to the passage of Section 1391(e) as one-half of the Mandamus and Venue Act as if that somehow supports their position. To the contrary, Section 1391(e) must be read together with its companion, Section 1361, as the Second Circuit emphasized in *Natural Resources Defense Council, Inc.* v. *Tennessee Valley Authority,* 459 F.2d 255 (2d Cir. 1972):

> "As already indicated, §1391(e) was not the whole statute which Congress enacted in 1962. It was the second section, the first being what has been codified as 28 U.S.C. §1361, and the two must be read together." *Id.* at 258.

The same observation is made in the House Report which states:

> "Section 2 is the venue section of the bill. Its purpose is similar to that of section 1. It is designed to permit an action which is essentially against the United States to be brought locally rather than requiring that it be brought in the District of Columbia simply because Washington is the official residence of the officer or agency sued." House Report at 2.

Respondents rely heavily upon the statute's use of the phrase "under color of legal authority" to support their plain meaning argument, insisting that the use of this phrase incorporates the jurisprudence of decisions involving state officers such as *Monroe* v. *Pape,* 365 U.S. 167 (1961), which dealt with the meaning of the phrase "under color of any statute, ordinance, regulation, custom or usage, of any State" as used in the Civil Rights Act of 1871.

The House Report, however, is explicit about the reason why the phrase "under color of legal authority" was used in the statute. The report specifically states that this phrase was used to cover actions against an official sued nominally in his individual capacity in order to circumvent the doctrine of sovereign immunity. House Report at 3-4.

There are two kinds of actions which involve official conduct taken under color of law. The first, discussed in *Ex parte Young,* 209 U.S. 123 (1908), and the Committee Reports, utilizes the "fiction that the officer is acting as an individual" in order to circumvent the doctrine of sovereign immunity.[2] The official is only a nominal defendant. *Nevada* v. *Hall,* 47 U.S.L.W. 4261 n.19 (U.S. March 5, 1979).

The second kind of action, recognized in *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971), nine years after Section 1391(e) was enacted, seeks damages from an official's personal resources. *See Land* v. *Dollar,* 330 U.S. 731 (1947). This kind of action, not being "in essence against the United States" was never contemplated or even discussed in the Committee Reports.

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[2] Respondents suggest that this kind of action cannot be the subject of an action in the nature of mandamus. Resp. Br. at 43. Obviously remedies of this nature, including those which seek the payment of money, are used to confine an official to his official duties.

Respondents try to paint a picture that Congress actually considered this second kind of action when it enacted Section 1391(e).[3] But the state of the law as it existed in 1962 demonstrates that it did not. As this Court noted one year later:

> "When it comes to suits for damages for abuse of power, federal officials are usually governed by local law.***Federal law, however, supplies the defense, if the conduct complained of was done pursuant to a federally imposed duty***or immunity from suit.***Congress could, of course, provide otherwise, but it has not done so. Over the years Congress has considered the problem of state civil and criminal actions against federal officials many times. See Hart and Wechsler, The Federal Courts and the Federal System, 1147-1150. But no general statute making federal officers liable for acts committed "under color," but in violation, of their federal authority has been passed." *Wheeldin* v. *Wheeler,* 373 U.S. 647, 652 (1963).

Since it was then thought that personal damage actions against federal officials who improperly acted under color of authority did not arise under federal law, and, in any event were barred by the broad official immunity defense then prevailing, it is inconceivable that Congress meant to include *Bivens*-type damage actions in Section 1391(e).

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[3] Although there is discussion of damage actions in the earliest stages of the House Committee debates on the 1960 draft statute, the Committee Reports, which the Congress had before it when it enacted the Mandamus and Venue Act, do not consider this second type of action.

II.

THE LEGISLATIVE PURPOSE AND HISTORY OF THE MANDAMUS AND VENUE ACT DEMONSTRATE CLEARLY THAT PERSONAL DAMAGE ACTIONS ARE NOT WITHIN ITS PURVIEW

Respondents' argument misconceives the purpose of the Mandamus and Venue Act; they presume that it was meant to facilitate tort suits against federal employees in their personal capacities. Respondents start their analysis with the text of H.R. 10089, the 1960 draft legislation, and conclude with the 1976 amendment.

The 1960 draft legislation clearly was limited to actions brought against federal employees in their official capacities.

Respondents say that Deputy Attorney General Walsh's letter to the House Committee advised that this draft would have no real effect because "it did not cover damage actions against federal officials for their acts outside the scope of their authority. . . ." Resp. Br. at 57-58. This is not what the letter says. It says that the draft would have no effect because it would not include any action brought against federal officials. It also describes the various types of such actions, but does not advocate that any particular type be included.

Respondents speculate that the reaction to Mr. Walsh's letter was to include everything he said was excluded. This implication is illogical and contrary to the remaining history of the statute.

Respondents turn to the House Judiciary Committee hearings ("Hearings") on the 1960 draft. They grasp onto Congressmen Poff's and Dowdy's preliminary reactions to a suggestion by a Justice Department witness, Mr. MacGuineas, that the House Committee assumed the statute would be limited strictly to mandamus actions. Hearings at 32. As a reading of the hearings in context as they immediately continue indicates, Congressmen Poff and Dowdy were talking about

including injunction actions and other actions in essence against the United States. *Id.* They were not suggesting that actions in essence against individual defendants be included.

Indeed, later, as the statute's scope developed, Congressmen Dowdy and Poff were convinced that the statute was not to include actions in essence against federal officials as individuals. Later in the hearings Congressman Dowdy stated clearly that he did not "understand that we [the Committee] have in consideration suits for money damages." Hearings at 87.

This view is consistent with that of the sponsor of the statute that he had "no intention of bringing tort actions against individual government employees." Hearings at 102.

Judge Albert Maris advised the Committee as Chairman of the Committee on Revision of the Laws of the Judicial Conference of the United States. He complained that from time to time the Committee had gotten off the track:

> "In the first place, I think we have been talking about subjects and types of litigation that are very far removed from what is really concerned in this case."
>
> "What we are really concerned with, as I understand it, is the opportunity to review Government actions that have taken place out in the states rather than having to come to Washington to review them." Hearings at 78.

Later, when responding to Congressman Dowdy's statement of his understanding that the Committee did not have in consideration suits for "money damages" against a person sued as an individual, Judge Maris said:

> "The only basis for a money damage suit is the old common law idea of suing a collector who has received money and presumably illegally and so you sue him and he has recoupment from the U.S. if he had just and reasonable cause but ordinarily I do not think suits for money damages would be involved." *Id.* at 87.

Congressman Dowdy replied: "That would not be covered by this." *Id.* at 87.

In any event, the intent of Congress cannot be determined from what a handful of congressmen and witnesses might say. *See* Jones, *Extrinsic Aids in the Federal Courts,* 25 Iowa L. Rev. 737, 750-53 (1940). As this Court has recognized, committee reports are the most useful documents in determining the intent of Congress. *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185 (1976); *see* Note, *The Courts And Committee Reports,* 1 U. Chi. L. Rev. 81 (1933).

The principal documents relied upon by respondents are some unadopted suggestions made by the Department of Justice. Congressional inaction is doubtful authority. Further, contrary to what respondents say, not one of the pre-passage memoranda of the Department of Justice advocates that the statute be changed to eliminate personal actions against officials for money damages. The Department merely sought a clarification of the commonly understood Congressional purpose to *exclude* the possibility of such actions. With the benefit of hindsight, this concern hardly appears frivolous.

Respondents rely heavily upon a mimeographed advice memorandum to United States Attorneys under the typewritten name of Deputy Attorney General Katzenbach, which was written after the enactment of the statute. That memorandum, which cannot be considered legislative history, says that Section 1391(e) is applicable to suits against Government officials for damages for actions taken beyond the scope of authority, and gives libel suits as an example. The memorandum, however, expressly qualified this seemingly inconsistent remark by quoting the House Report's explanation of why the words "under color of legal authority" were used in the statute:

> "By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section

1391(e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. It intends to include also those cases where the action is *nominally* brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen." [emphasis added.]

Respondents also rely on the 1976 amendment to Section 1391(e), and adopt the *Driver* court's notion that its new joinder provision confirms that the 1962 statute covers actions seeking damages from an official. *Driver* insisted that it would make no sense to join a third party in a mandamus action. This is simply incorrect. Complete relief in an action in the nature of mandamus often cannot be secured unless state officials or private parties are joined. For example, where a farmer seeks mandamus to secure grazing rights on government land he may also need, at the same time, to eject another farmer wrongfully in possession.

The legislative history of the 1976 amendment expressly confirms that Section 1391(e) is "limited to judicial review actions". The Senate Judiciary Committee which considered the amendment stated:

"Joinder of Third Persons

A related problem concerns joinder of third persons as parties defendant. When section 1391(e) of title 28, which governs venue of actions against Federal officers and agencies, was enacted in 1962, its broadened venue and extra-territorial service of process were limited to judicial review actions in which each defendant is an officer or employee of the United States or an agency thereof." S. Rep. No. 996, 94th Cong. 2d Sess. at 17 (1976).

The Committee Report which discussed the 1976 amendment cited with approval the decision in *Green* v. *Laird*, 357 F.Supp. 227 (N.D. Ill. 1973), which held that the statute was applicable

to an action against the defendant Secretary of Defense in his nominal capacity, but was inapplicable as to those aspects of that litigation seeking damages from his personal assets. S. Rep No. 996, *supra* at 18. This is precisely the point urged by petitioners.

The final element of the legislative history upon which respondents repeatedly rely is a sentence quoted out of context from the Committee Reports which reads:

"The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." House Report at 3.

Petitioners' main brief (pp. 15-16) explains that certain actions seeking money damages *nominally* from federal officials faced precisely the venue problem which Section 1391(e) was intended to cure. There was no "venue problem" with personal damage actions against government officials. They could be and were sued in district courts all over—restricted in no way to the District of Columbia. When the Committee Reports are read as a whole, as they must be, it is clear that only those actions which presented the venue problem and were previously restricted to the District of Columbia are covered by the statute.

With this sentence from the legislative history disposed of, there is nothing which arguably supports respondent's position.

As petitioners pointed out in their principal brief, it makes no sense to assume that Congress addressed actions which could not then, as a practical matter, be brought in federal court. Respondents go to great lengths to show that attempts were being made in 1962 to bring personal damage actions against federal officials. While this may be so, there were no issues of jurisdiction and venue in such actions, then or now, other than those that arise in every civil action brought in

federal court. The legislative history of the statute clearly shows that only actions which were formerly restricted to the District of Columbia are within the scope of the statute.[4] Respondents' action cannot meet this test.

III.

PETITIONERS' DUE PROCESS CLAIM HAS NOT BEEN MET

Respondents fail to meet head on petitioners' constitutional claim that a construction of Section 1391(e) giving every district court personal jurisdiction over federal officials creates an intolerable burden on the right to defend and thus violates due process. Rather, respondents claim that "concern about fairness for the respondents" is overlooked if they, like all litigants, must meet the traditional jurisdictional and venue tests. The other aspect of respondents' answer is their claim that payment of legal fees by the Government eliminates due process concerns.

It is disingenuous to suggest that the payment of petitioners' counsel fees by the Justice Department somehow affects petitioners' due process rights. The burdens of litigation far from home are more substantial than the need to pay lawyers. Indeed, if lawyers are retained, they are ordinarily compensated whether an action is brought in a convenient or an inconvenient forum, and whether a defendant is a government official or not. Ironically, respondents themselves recognized quite dramatically in their complaint that defending a suit in a distant forum caused "the intense pain and suffering of having their lives so totally disrupted." App. at 17.

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[4] Respondents attempt to disregard the Court's discussion in *Schlanger* v. *Seamans*, 401 U.S. 487, 490 (1971), by arguing that habeas corpus actions fit within the "except as otherwise provided by law" phrase in Section 1391(e). This is unavailing since the habeas corpus statute does not, as respondents say, provide for venue or service of process. 28 U.S.C. §2241. Respondents have found no escape from the square holding in *Schlanger*, after review of the legislative history, that the statute was enacted "to broaden the venue of civil actions which could previously have been brought only in the District of Columbia." *Id.* at 490 n.4.

Payment of counsel fees, where made, is only a matter of grace. The government, through regulations promulgated by the Attorney General, may or may not pay the counsel fees of certain federal officials sued in their individual capacities. 28 C.F.R. §§50.15, 50.16. There is no assurance that such payments will continue through the litigation of this case. Indeed, since respondents' damage suit is based on a claim that petitioners acted beyond the scope of their employment, respondents impliedly take the position that petitioners are not entitled to government paid private counsel. 28 C.F.R. §50.16(a)(2)(ii).

The United States as *amicus curiae* has now adopted the position that the interpretation of Section 1391(e) by the court below is not violative of due processs. *Compare* the position of the United States in *United States* v. *Scophony Corp.*, 333 U.S. 795, 804, 818 (1948).

The United States submits that if petitioners' constitutional claim is adopted, the jurisdictional provisions of the interpleader, antitrust and securities laws might have to be declared invalid. There is no substance to this position since these laws, insofar as they permit service beyond a forum's jurisdiction, are carefully guarded and do not raise issues of fairness to defendants.[5]

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[5] In federal interpleader, 28 U.S.C. §§1397, 2361, the property is within the forum and is the subject matter of the litigation. This provides a fair basis for summoning the claimants into the forum to determine their respective rights to the property. *Shaffer* v. *Heitner*, 433 U.S. 186, 207-208 (1977). Indeed, it is likely that state courts could also exercise interstate interpleader jurisdiction consistently with fourteenth amendment due process for the reason stated by Justice Traynor in *Atkinson* v. *Superior Court*, 49 Cal.2d 338, 348, 316 P.2d 960, 966 (1957), *cert. denied*, 357 U.S. 569 (1958): "A remedy that a federal court may provide without violating due process of law does not become unfair or unjust because it is sought in a state court instead."

Under the antitrust laws, 15 U.S.C. §5, 25, additional defendants in conspiracy cases may be summoned whether or not they reside in the district only when the court finds "that the ends of justice require" that they be joined. In these cases the out-of-state defendant must be added because it is claimed that he acted in combination with the in-state defendant or defendants already before the court. The com-

The decision in *Fitzsimmons* v. *Barton,* 589 F.2d 330 (7th Cir. 1979), recognized that *Shaffer* v. *Heitner,* 433 U.S. 186 (1977), "rejected the notion that Due Process limitations on jurisdiction arose from considerations of territorial sovereignty." 589 F.2d at 332. The court in *Fitzsimmons,* however, narrowly read *Shaffer* as relating only to the fairness of the exercise of power by a particular sovereign and not the burdens of litigating in a distant forum. *Id.* at 333. This is a tautology. The significant burden imposed by the exercise of extra-territorial jurisdiction by a particular sovereign and the burden which makes exercises of personal jurisdiction so unfair as to violate due process is the burden of litigating in a distant forum. If such a burden is unreasonably imposed, it creates a due process infirmity whether or not jurisdiction is extra-territorial.

Nor do the cases cited in *Fitzsimmons, id.* at 333 n.3, support the theory it employed. Of course, Congress can permit the process of federal courts to run throughout the nation. State court process does the same under long-arm statutes. The question is whether the exercise of jurisdiction in the particular case and under the particular statute is fundamentally fair. The statute and facts addressed in *Fitzsimmons* did not raise a fairness issue. *Id.* at 334-335 nn.6, 7. If the burdens imposed on the right to defend are to be considered in the due process equation, as they must, *Fitzsimmons* was decided on an incorrect theory.

There is no dispute that the United States may exercise sovereign authority over petitioners. The manner in which that authority may be exercised is limited by due process, which requires that our traditional notions of fair play and substantial justice be observed.

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bination in violation of the antitrust laws must, at least at one end, have been committed in the forum jursdiction pursuant to the agreement of the out-of-state defendants.

In securities cases, 15 U.S.C. §§77v(a), 78aa, the relevant statutes specifically limit the districts in which suit can be brought to the districts where the defendant is found, or is an inhabitant, or transacts business, or where the offer or sale of securities took place, if the defendant participated therein. In any such instance the demands of due process are met since the defendant would have "affiliating circumstances" which make it fair to require him to defend there. *See also* Appendix K (p. 51a to Petition for Certiorari).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Dated: New York, New York
April 17, 1979

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